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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JACK A. LUSTMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GUSTAVE B. GARFIELD,
Attorney for Petitioner,
122 East 42nd Street,
New York 17, N. Y.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Jack A. Lustman prays that a writ of certiorari issue to review the judgment entered in the office of the Clerk of the United States District Court for the Southern District of New York on August 28, 1958 making the order of the United States Court of Appeals for the Second Circuit remitted to the District Court on August 20, 1958, the judgment of the District Court. The opinion of the Court of Appeals affirming the judgment of conviction of the petitioner on a mail fraud charge was filed in the Court of Appeals on July 30, 1958 and the order of affirmance, followed accordingly the same day. The mandate to the District Court was withheld for 20 days by the Clerk of the Court of Appeals under Rule 28 (b) of the Rules of the Court of Appeals, Second Circuit. It was filed in the District Court on August 20, 1958 and judgment of affirmance entered in the office of the Clerk of the District Court on August 28, 1958 (see copy of judgment in appendix herein, p. 46, *infra*).

Jurisdiction

Jurisdiction to hear this appeal is predicated on Title 18 U. S. Code, Federal Rules of Criminal Procedure For the District Courts of the United States, Rule 37 (b) (2) which in pertinent part provides,

> (2) Time of Making Petition; Petition for writ of certiorari may be made within 30 days after entry of the judgment • • •. (As amended December 27, 1948)

Petitioner contends that the foregoing amendment worked a distinct change in the time and manner of applying for writs of certiorari in criminal cases as they had theretofore existed. Prior to the foregoing amendment petitions for writs of certiorari in criminal cases were governed by Rule XI of the Rules of Practice and Procedure dated May 7, 1934 (292 U. S. 661, 666), which provided in pertinent part as follows:

> "XI. *Writs of certiorari.* Petition to the Supreme Court of the United States for writ of certiorari to review a judgment of the *appellate court* shall be made within thirty (30) days after the entry of the judgment of *that court.*" (Emphasis supplied)

It will be noted that while in Rule XI above quoted specific reference was made to the *appellate court* and the judgment of *that court,* under the amended rule 37, reference is made to "30 days after the entry of the judgment." Since Rule 37 comes under the major heading of "Federal Rules of Criminal Procedure for the District Courts of the United States", by fair inference therefore the petitioner contends that the time to apply for a writ of certiorari runs from the date of the entry of the judgment of affirmance in the District Court, which date is August 28, 1958, or the date of remittance of the mandate of the Court of Appeals, which is August 20, 1958 (see p. 16 *infra*).

The Question Presented

The Court of Appeals has found that there was an undue delay of four years in the prosecution of defendant. "This leaves a period of approximately four years during which nothing was done to bring the case to trial. This was an undue delay. * * * we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. Thus we assume that the unexcused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though appellant has not shown that it prejudiced him in the presentation of his defense."

The Court of Appeals has held however that an oral request of the United States Attorney in charge of the particular prosecution, for a prompt trial is not "sufficient to satisfy the requirement of a demand. We think it clear that a request addressed to the prosecutor is not sufficient, and although we have not found any federal decisions directly in point, the state decisions in those states following the demand rule so hold."

The Court of Appeals refused to follow the New York rule expressed in *People* v. *Prosser*, 309 N. Y. 353, which requires a defendant only to move to dismiss prior to trial.

> "Judge Fuld's well-reasoned opinion in *People* v. *Prosser, supra*, explicates the reasons for placing the duty of procuring a prompt trial upon the state rather than upon the defendant, reasons which we might consider weighty if the contrary rule were not settled doctrine in the federal courts."

It is submitted that in no case cited by the Court of Appeals was it shown as in the instant case that the trial calendar of criminal cases was entirely within the control of the United States Attorney, as it is in the Southern District of New York. Here the witness Herbert Charlson,

Clerk of the United States District Court for the Southern District of New York testified as follows on the motion in arrest of judgment.

Q. Do you know Mr. Charlson, how the criminal calendar has been handled in the past six years in this court? A. I can only answer it this way: The Clerk's office has nothing to do with the preparation of the criminal calendar.

Q. Who has to do with the preparation of the criminal calendar? A. The United States Attorney's Office prepares the criminal calendar. Prepares—I used the word "prepares."

Q. Who decides what case is to go on the criminal calendar? A. I don't know. I assume it would be—

Mr. Jaffe: Objection your Honor.

The Court: Yes.

Q. Is there a regular office maintained by the United States Attorney for the handling of the criminal calendar? A. I believe from my own experience that Mr. Ballen from the United States Attorneys Office handles the criminal calendar. (rec. p. 339)

The Court: Mr. who?

The Witness: Mr. Jack Ballen handles the preparation of the criminal calendar.

Mr. Jaffe: I just want this clarified whether it is the preparation of the physical calendar that the witness is talking about.

The Court: You mean he prepares a list of the cases to come on the criminal calendar, is that correct?

The Witness: That is correct. (record 340)

The United States Attorney conceded on the motion in arrest of judgment that there was no personal waiver by conduct by defendant's attorney and no consent to a delay

"Mr. Garfield: You have contended and sworn that I personally waived an immediate trial by my conduct on behalf of the defendant or that I consented to a delay and I want to show that I did not.

Mr. Jaffe: We have not made any such contention, as far as I know, your Honor.

Mr. Zinke. Nor I your Honor. In my affidavit I set the law on that point but I never contended it personally." (Record p. 350)

In arrest of judgment, defendants attorney testified as to his oral demand of the United States Attorney in charge of the prosecution, made within the three months period of 1952 as follows:

"The Witness (Garfield): Then I would come to court and walk to the criminal court and meet Mr. Carton, and I said to Mr. Carton on one occasion particularly, 'Mr. Carton please,'—

The Court: Fix the time.

The Witness: Within a period of three months.

The Court: After what?

The Witness: After January, 1952.

The Court: 'Mr. Carton, please, either move the case for trial or dismiss it while my witnesses are available.'

Mr. Jaffe: Your Honor, the Government is going to move to strike out this whole line of testimony with Mr. Carton because in all the conversations with Mr. Garfield there have been serious problems about what was said in these conversations and it is hearsay, and if Mr. Garfield—

The Court: It is not hearsay, as I see it, on the conversations that he had with the attorney who was in charge of the prosecution.

The Witness: May I be permitted to call your attention—

The Court: I will deny the motion (Record p. 355)."

Despite the fact that there was no denial that such oral request for an immediate trial was made within three months of January 1952 upon the United States Attorney in charge of the prosecution, the Court of Appeals has held such demand insufficient; It said:

> "Appellant urges that an alleged conversation which had attorney had with an assistant United States Attorney sometime in 1952, in which his attorney demanded a prompt trial, is sufficient to satisfy the requirement of a demand. We think that a request addressed to the prosecutor is not sufficient, and although we have found no federal decisions directly in point, the state decisions in those states following the demand rule so hold. See e.g., State v. Smith, 10 N. J. 84, 89 A. 2nd 414: (1952); Hutson v. State, 72 Okla. Crim. 61, 112 P. 2nd 1109 (1941); State v. Sawyer, 263 Wis. 218, 56 N. W. 2nd (1953)."

It seems a harsh rule to compel a New York attorney to rely upon as yet unreported or undecided cases of New Jersey (1952) and Wisconsin (1953) and obscure decisions of an Oklahoma criminal court to make up his mind whether to make an oral request for an immediate trial or make a written motion addressed to the court when the New York law requires that no demand is needed at all (*Peo. v. Prosser, supra*).

Reasons for Granting the Writ

Particularly since there was no authoritative decision by any federal court until the decision in this case by the Court of Appeals Second Circuit and in view of the importance of the matters involved, this court should once and for always settle the disputed question as to whether it is necessary for a defendant to move for a speedy trial (1) by formal motion, (2) by oral request, or (3) whether the burden is not upon the prosecuting attorney to move the case for speedy trial or suffer dismissal of the indictment for undue delay in moving the case for trial.

We live in one United States of America under one constitution and with one Bill of Rights. Surely the founding fathers did not intend that the Sixth Amendment should mean two things in the same country or even in the same state. It is submitted that this Court should be the final arbiter of the meaning of the Sixth Amendment.

Specifications of Error to Be Urged

The Court of Appeals erred:

1. In holding that the defendant in a criminal case is required to make a formal motion for a speedy trial or be deemed to have waived his right to a speedy trial under the Sixth Amendment.
2. In holding that it was not the burden and duty in a District wherein the United States Attorney controls the criminal calendar, for the United States Attorney to move the case for trial or suffer dismissal of the indictment for failure to grant defendant a speedy trial after an undue delay in prosecution.
3. In holding that an oral request addressed to the prosecutor in charge of the prosecution is insufficient to satisfy the requirement of a demand for a speedy trial under the Sixth Amendment.

Wherefore it is respectfully submitted that this petition for a writ of certiorari should be granted.

Gustave B. Garfield,
Attorney for Petitioner,
122 East 42nd Street,
New York 17, N. Y.

September 1958.

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 7—October Term, 1957.

(Argued October 16-17, 1957 Decided July 30, 1958.)

Docket No. 24223

UNITED STATES OF AMERICA,

Appellee,

v.

JACK A. LUSTMAN,

Defendant-Appellant.

Before:

MEDINA, HINCKS and WATERMAN,

Circuit Judges.

Appeal by defendant from a judgment of conviction for mail fraud, entered in the United States District Court for the Southern District of New York, Levet, *J.*, after a trial by jury; from a pretrial order denying a motion to dismiss the indictment upon the ground that defendant was denied the right to a speedy trial; and from the denial of a motion in arrest of judgment predicated upon the same ground. Affirmed.

Appendix

PAUL W. WILLIAMS, United States Attorney, Southern District of New York (William K. Zinke, Maurice N. Nessen, Asst. U. S. Attorneys, of counsel), *for Appellee.*

GUSTAVE B. GARFIELD, New York City, *for Defendant-Appellant.*

WATERMAN, *Circuit Judge*:

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *" The sole question raised by appellant, who was convicted of mail fraud after a jury trial held more than five years after the date of indictment, is whether this constitutional guarantee was denied him.

The indictment was filed in the United States District Court for the Southern District of New York on August 29, 1951. In this indictment appellant was charged in five counts with having devised a scheme to defraud various persons from June 11, 1947 through March 1949 by using the mails. It was alleged that as a result of this scheme goods and merchandise were sent to appellant and services were performed for him for which he failed to pay.

During the months immediately following the indictment appellant's attorney, who has represented him throughout the case, addressed various preliminary motions to the indictment. This stage of the case was concluded on December 3, 1951 when appellant appeared in the district court and pleaded not guilty to the charges contained in the indictment. Then followed during December 1951 and January 1952 an exchange of correspondence between appellant's attorney and the United States Attorney's office.

In this correspondence, which was initiated by defense counsel, two matters were brought to the attention of the United States Attorney's office: Appellant's mental condition during the period covered by the indictment; and information tending to show that others might have been responsible, at least in part, for the crimes with which appellant was charged. With respect to the first matter, it was stated that appellant was a shell-shocked war veteran, that he had been under psychiatric treatment prior to early 1949, and that at that time he had been admitted to the United States Veterans' Hospital at Lebanon, Pennsylvania, where he had been given shock therapy. The United States Attorney's office advised appellant's attorney that this information would be investigated, and thereafter sought substantiation from appellant. However, appellant refused to permit a psychiatrist, who allegedly had treated him, to disclose his records, and also refused to submit to psychiatric observation by the Government.

The second matter raised by appellant was an offer to prove through the report of a handwriting expert that others were responsible, in part, for the crimes charged. On January 21, 1952 defense counsel sent such a report along with related papers to the United States Attorney's office and indicated his availability to discuss the matter after "you have had an opportunity to examine the enclosed papers."

The purpose of this correspondence is clear. Defense counsel quite properly was attempting to persuade the United States Attorney to make further investigations and to give further consideration to the case in the hope that it would be dropped. These objectives met with only partial success. The United States Attorney's office was sufficiently moved by the information supplied by appellant so that it did not bring the case to an immediate trial. On the other hand, it was not moved to ask the district court

to dismiss the indictment. The net result was a prolonged delay.

During the four-year period from January 1952 until January 1956 no further action was taken. This long period of drift was ended in January 1956 when the United States Attorney's office notified appellant's attorney that the case would be placed on the criminal calendar for trial. Some three months later appellant moved to dismiss the indictment because of the Government's delay in bringing the case to trial. The hearing on this motion was adjourned on consent for two months so that appellant could consider whether to agree to undergo psychiatric observation. On July 18, 1956, Judge Dimock denied this motion in a written opinion, ruling that because of appellant's failure to move for a trial he "waived any rights to a trial earlier than that which can now be afforded." Appellant sought immediate review of this interlocutory order in this court on the ground that the motion to dismiss contained a clause seeking injunctive relief against the United States Attorney from further prosecution of the case. After the application had been denied by Judge Medina, and a further application for convening a special court to consider the appeal had been denied on behalf of this court by Chief Judge Clark in a written opinion, appellant petitioned the Supreme Court for a writ of mandamus directing us to convene a special court to entertain the appeal. This petition was denied.

Meanwhile, defense counsel and the United States Attorney's office resumed discussion of appellant's mental condition during the period covered by the indictment. On June 21, 1956, appellant refused for the second time to submit to psychiatric observation, and in response to a Government request for an affidavit from a psychiatrist who had treated him, furnished the name of a supposed psychiatrist who "unfortunately" had died the previous November.

When defense counsel was informed that government investigation had failed to discover the existence of this psychiatrist at the address given, a different and "correct" name of a dead psychiatrist was submitted. Although defense counsel stated that the records of this psychiatrist were available, they were never produced by appellant.

In November 1956 the case finally reached trial. Appellant was convicted by a jury on four of the five counts and sentenced to a fine of $750 and concurrent three-year terms of imprisonment. The sentences of imprisonment were suspended and appellant was placed on probation for eighteen months. On November 13, 1956, Judge Levet denied appellant's motion in arrest of judgement, which was predicated on the claim that appellant was denied the right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution. This appeal followed.

In this case there was a delay of over five years from the time of indictment until the commencement of the trial. Of this period, however, it is clear that nearly a year and a half was caused by the appellant's motions. From August 1951 until January 1952, appellant was seeking to avoid a trial by addressing various motions to the indictment and by submitting certain information for the consideration of the United States Attorney. After the case was reactivated in January 1956, appellant again attempted to prevent a trial, both by objecting to the delay and by further discussions with the United States Attorney's office with respect to his mental condition during the period covered by the indictment. These delays are attributable primarily to appellant and cannot be considered in determining whether or not his right to speedy trial has been violated. The Sixth Amendment prohibits only an unreasonable delay and a defendant cannot exploit a delay which is attributable primarily to his own acts or to which

he has consented. *United States* v. *Pollard*, 352 U. S. 354 (1957); *United States* v. *Provoo*, 350 U. S. 857 (1955), aff'g 17 F. R. D. 183 (D. Md. 1955); *Chinn* v. *United States*, 228 F. 2d 151 (4 Cir. 1955).

This leaves a period of approximately four years during which nothing was done to bring the case to trial. This was an undue delay. The Government argues that appellant has not made a convincing demonstration that the delay prejudiced him in the presentation of his case and, although we agree, we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment. *Taylor* v. *United States*, 238 F. 2d 259 (D. C. Cir. 1956); *United States* v. *Provoo*, 17 F. R. D. 183, 203 (D. Md. 1955), aff'd 350 U. S. 857 (1955).

Thus we assume that the unexcused delay of approximately four years was an undue delay within the meaning of the Sixth Amendment even though appellant has not shown that it prejudiced him in the presentation of his defense.

We therefore turn to the crucial issue on this appeal—whether appellant can complain of the Government's delay in bringing his case to trial when he failed to demand an early trial from the court. A majority of the states have adopted a rule requiring the defendant to demand trial or resist postponement. E.g., *State* v. *Smith*, 10 N. J. 84, 89 A. 2d 404 (1952); *State* v. *Sawyer*, 266 Wis. 494, 63 N. W. 2d 749 (1954). A minority, however, require the defendant only to move to dismiss prior to trial. E.g., *People* v. *Prosser*, 309 N. Y. 353, 130 N. E. 2d 891 (1955); *Flanary* v. *Commonwealth*, 184 Va. 204, 35 S. E. 2d 135 (1945). Judge Fuld's well-reasoned opinion in *People* v. *Prosser*, *supra*, explicates the reasons for placing the duty of procuring a prompt trial upon the state rather than upon the defendant, reasons which we might consider weighty if the

contrary rule were not settled doctrine in the federal courts.

The federal decisions, however, clearly establish that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted. *United States* v. *Kaye*, 251 F. 2d 87 (2 Cir. 1958), *cert. denied*, 78 S. Ct. 702 (1958); *Collins* v. *United States*, 157 F. 2d 409 (9 Cir. 1946); *Bayless* v. *United States*, 147 F. 2d 169 (8 Cir. 1945), *rev'd on other grounds*, 150 F. 2d 236 (1945); *Pietch* v. *United States*, 110 F. 2d 817, 129 A. L. R. 563 (10 Cir. 1940), *cert. denied*, 310 U. S. 648 (1940); *Worthington* v. *United States*, 1 F. 2d 154 (7 Cir. 1924), *cert. denied*, 266 U. S. 626 (1924); *United States* v. *Research Foundation*, 155 F. Supp. 650 (S. D. N. Y. 1957); *United States* v. *Stein*, 18 F. R. D. 17 (S. D. N. Y. 1955); *United States* v. *Provoo*, 17 F. R. D. 183, 198 (D. Md. 1955), aff'd 350 U. S. 857 (1955). The requirement of a demand, leading to a trial on the merits when the defendant has not complained of the delay, "stresses that the right to a speedy trial is not designed as a sword for defendant's escape, but rather as a shield for his protection." Note, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 853 (1957). Suggested exceptions to this rule, such as that the defendant did not now of the pending charge, *Taylor* v. *United States*, *supra*, that the delay was caused by trial in a district court of improper venue, *United States* v. *Provoo*, *supra*, and that the defendant because of imprisonment, ignorance, or lack of legal advice was not in a position to claim his right, *United States* v. *Chase*, 135 F. Supp. 250 (N. D. Ill. 1955), are inapplicable in this case.

Appellant urges that an alleged conversation which his attorney had with an assistant United States Attorney sometime in 1952, in which his attorney demanded a prompt trial, is sufficient to satisfy the requirement of a demand

We think it clear that a request addressed to the prosecutor is not sufficient, and, although we have not found any federal decisions directly in point, the state decisions in those states following the demand rule so hold. See, e.g., *State* v. *Smith*, 10 N. J. 84, 89 A. 2d 404 (1952); *Hutson* v. *State*, 72 Okla. Crim. 61, 112 P. 2d 1109 1941); *State* v. *Sawyer*, 263 Wis. 218, 56 N. W. 2d 811 1953).

It follows that appellant, since he did not properly assert his constitutional right, may not now attack the judgment of conviction.

Affirmed.

Order and Judgment

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,

v.

JACK A. LUSTMAN,

Defendant

ORDER OF JUDGMENT

C 136-164

A judgment of conviction and sentence having been entered herein against the above entitled defendant and an appeal from said judgment having been taken to the United States Court of Appeals for the Second Circuit and the said Circuit Court having affirmed said judgment and having filed a certified copy of its judgement herein on the 20th day of August, 1958 and

Upon motion of Arthur H. Christy, United States Attorney for the Southern District of New York; it is

ORDERED, ADJUDGED AND DECREED that the judgment of the United States Court of Appeals for the Second Circuit is and the same hereby is, made the judgment of this Court

Dated: New York, N. Y., 28 day of August, 1958.

(s) ALEXANDER BICKS,
U.S.D.J.